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No. 10-470

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LAWRENCE RUSTON, et ux.,

Petitioners,

VS.

TOWN BOARD FOR THE TOWN OF SKANEATELES, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court's reliance on *Conley v. Gibson* in setting the pleading standards for an equal protection class-of-one claim in *Village of Willowbrook* v. *Olech* reasonably infers that this Court modified *Olech* when it overruled *Conley*.

2. Whether an equal protection class-of-one plaintiff must make specific factual allegations plausibly suggesting he is similarly situated to comparators in order to state a valid cause of action and show an entitlement to relief.

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INTRODUCTION

Like many other petitions this Court has likely received over the preceding two years, this petition involves a dissatisfied plaintiff arguing that this Court's recent reinterpretation of federal pleading principles in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) need "clarification" as applied to a particular cause of action—in this case, equal protection class-of-one.

However, in the context of an equal protection class-of-one claim, the new federal pleading principles are easy to apply and present little chance of posing problems for judges or litigants in the future. In *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000), this Court applied boilerplate federal pleading standards without modification. When they became the *new* boilerplate, *Twombly* and *Iqbal*'s principles impliedly modified *Olech*.

In addition, there is no circuit split as to the effect of *Twombly* and *Iqbal* on equal protection class-of-one claims. The petitioners' attempt to present one is highly strained and relies on questionable case law. In reality, the federal circuits have been trending toward a uniform interpretation of the new pleading principles as applied to equal protection jurisprudence.

In sum, there is no need to revisit *Olech* in light of *Twombly* and *Iqbal*.

REASONS FOR DENYING THE PETITION

I. This Court Impliedly Modified *Olech* When it Expressly Overruled *Conley*.

The petitioners' primary contention is simple to answer. To the extent *Olech* articulated a pleading standard for equal protection class-of-one claims, *Twombly* and *Iqbal* certainly modify that standard. This Court left no question that the pleading principles it articulated in *Twombly* and *Iqbal* supersede the former principles in *Conley v. Gibson*, 355 U.S. 41 (1957). There is also no question that this Court expressly intended to apply *Conley*'s pleading principles to equal protection class-of-one claims. When *Twombly* and *Iqbal* retired *Conley*, elementary logic dictates that *Olech* must now be read in light of the new pleading principles.

In *Olech*, this Court granted certiorari for the primary purpose of deciding whether to expressly recognize an equal protection class-of-one action. Its discussion of the appropriate pleading standard—a secondary consideration—consisted of one simple paragraph:

> Olech's complaint can be fairly construed as alleging that the Village [of Willowbrook] intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly-situated property owners. *See*

> *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) . . . These allegations . . . are sufficient to state a claim for relief under traditional equal protection analysis.

Olech, 528 U.S. at 565.

Olech's citation to *Conley* is key. At the time, *Conley* was the boilerplate pleading standard applicable to nearly all federal causes of action, permitting a claim to survive a motion to dismiss "unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46.

Twombly, of course, expressly retired *Conley*'s "no set of facts" standard and iterated a new principle that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." 550 U.S. at 555. *Iqbal* expressly applied *Twombly* to all causes of action. 129 S.Ct. at 1953.

There is obviously no need to reinterpret *Olech*. Because *Olech* expressly cited *Conley*, and because *Conley* was expressly replaced by *Twombly* and *Iqbal*, therefore the new pleading principles also apply to equal protection class-of-one claims. Such a simple conclusion of law does not merit this Court's attention.

II. There is No Existing Circuit Split on the Question of Pleading Standards for Class-of-One Equal Protection Claims.

The petitioners' assertion that a circuit split exists on their question presented is labored and artificial. Although they claim the Third Circuit currently follows a different rule than the rule the Second Circuit adopted in the case below, the Third Circuit's own jurisprudence on that rule is far from well-established. In reality, the effects of *Twombly* and *Iqbal*, as evidenced by the lower court's holding, have helped mend—not create—an existing split across several federal circuit courts of appeals.

A. The "Circuit Split" the Petitioners Describe is Illusory.

The petitioners offered just one allegedly divergent jurisdiction: the Third Circuit, represented by the cases *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008) and *Mann v. Brenner*, No. 09-2461 (3d Cir. Mar. 30, 2010). The petitioners touted both of those cases as proof that an equal protection class-of-one litigant in the Third Circuit would not need to plead specific instances of discriminatory conduct to survive a motion to dismiss on the pleadings. However, under even cursory scrutiny, those Third Circuit cases do not present a *bona fide* divergence between circuits worthy of this Court's examination.

The most recent of the two cases, *Mann*, is far too weak to create a circuit split. In *Mann*, the equal protection claim at issue was purely secondary to the

plaintiff's primary cause of action, and was not even explicitly pled as a class-of-one claim. *Id.* at *10. Additionally, the Third Circuit expressly marked the case "Not Precedential." As such, that court will resist citing it in support of any future decisions. 3d Cir. Internal Operating P. 5.7 (stating that the Third Circuit "by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing."); *see also DiBella v. Borough of Beachwood*, 407 F.3d 599, 602 fn. 4 (3d Cir. 2005).

The other case the petitioners presented, *Phillips*, also does not create a *bona fide* circuit split. In *Phillips*, decided after *Twombly* but before *Iqbal*, the Third Circuit admitted that none of its prior jurisprudence had examined the pleading standards for equal protection class-of-one claims. 515 F.3d at 244. As a result, *Phillips* directly borrowed the pleading standards the Second Circuit had previously articulated in *DeMuria v. Hawkes*. *Id.* at 244-45 (citing 328 F.3d 704, 707 (2d Cir. 2003)). *Phillips* cited *DeMuria* while *DeMuria* was still good law. Since the lower court in this case expressly overruled *DeMuria*, the Third Circuit would likely pay close attention to that reversal in any future case involving pleading standards for class-of-one equal protection claims. And, in revisiting that issue, the Third Circuit would also need to recognize *Iqbal*—as well as three additional years of clarifying jurisprudence from all federal circuits affirming that a "threadbare" recitation of an element of a cause of action will not sustain it beyond a motion for dismissal. *Phillips* is dated precedent, based expressly on a reversed case,

and is therefore ripe for reversal itself. It would be presumptuous for this Court to recognize a circuit split until the Third Circuit recognizably affirms *Phillips*' rule in the face of contradictory precedent.

B. If Anything, the Second Circuit's Decision Below Helped Resolve a Circuit Split.

The Second Circuit's holding in the case below helped clarify case law, not confuse it. By reversing *DeMuria* and requiring factually-specific pleadings to show entitlement to relief, the Second Circuit mended a stark divergence in pleading standards for equal protection class-of-one claims that had existed for several years.

In 2001, not long after this Court handed down *Olech*, the First Circuit held in *Barrington Cove Ltd. P'ship v. Rhode Island Housing and Mortgage Fin. Corp.*, 246 F.3d 1, 8-9 (1st Cir. 2001) that an equal protection class-of-one plaintiff must plead enough specific facts to show that his property was "similarly situated" to comparator properties receiving allegedly differential treatment. The First Circuit held that a complaint must plead such facts with "reasonable particularity" and also held that conclusory pleadings would not suffice. *Id.* at 8.

And, in 2007, in a case decided shortly after *Twombly* but making no reference to it, the Eleventh Circuit held,

> [w]e see no reason that a plaintiff in a "class of one" case should be subjected to a more lenient "similarly situated" requirement than

> we have imposed in other contexts. Adjudging equality necessarily requires comparison, and "class of one" plaintiffs may (just like other plaintiffs) fairly be required to show that their professed comparison is sufficiently apt.
>
> * * *
>
> A "class of one" plaintiff might fail to state a claim by omitting key factual details in alleging that it is "similarly situated" to another.

Griffin Industries, Inc. v. Irvin, 496 F.3d 1189, 1204-05 (11th Cir. 2007) (deciding an appeal from a motion to dismiss). The Eleventh Circuit also indicated its rule was a direct extension of its pre-*Olech* equal protection jurisprudence. *Id.* at 1205 (citing *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1367-68 (11th Cir. 1998)).

By admittedly allowing "general allegation[s]" of a similar situation between a plaintiff and comparators, the Second Circuit in *DeMuria* stood directly at odds with two of its sister circuits. 328 F.3d at 707. That divergence existed for seven years, until the court below reversed the rule and brought consistency. *Ruston v. Town Bd. for the Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) (expressly overruling *DeMuria* and requiring an equal protection class-of-one plaintiff to "allege facts that 'plausibly suggest an entitlement to relief'"). By reversing its position, the Second Circuit joined a large block of federal circuits that apply comparable standards to equal protection class-of-one pleadings.

III. No Substantial Question Exists as to Whether *Twombly* and *Iqbal* Impliedly Require Factual Allegations in Equal Protection Claims.

Post-*Twombly* or post-*Iqbal* decisions from other circuits interpret those cases to require more than generalized conclusory pleadings. Several federal circuits now hold that a plaintiff must plead specific factual allegations to show a plausible entitlement to relief—both in class-of-one claims and traditional equal protection actions. *See, e.g.*, *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 550 (6th Cir. 2007) (holding "to conclude that [the plaintiffs] allege that members of their class were treated differently from one another without their mentioning any such discriminatory treatment is both unreasonable and contrary to *Twombly* . . ."); *Robbins v. Oklahoma*, 519 F.3d 1242, 1253 (10th Cir. 2008) (holding that "[t]o cure the notice and plausibility problems with their equal protection claim, plaintiffs must provide additional facts to show their grounds for relief"); *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1275 (11th Cir. 2008) (holding that "with respect to a class-of-one claim, we are obliged to apply the 'similarly situated' requirement with rigor . . . [the plaintiff] must identify an instance in which a similarly situated contractor completed its project without being subject to the same testing procedures . . .") (internal citations and quotations omitted); *see also Glover v. Mabrey*, No. 08-7048 at *27-28 (10th Cir. June 28, 2010) (holding that [the plaintiff] has failed to allege, as it must, the identity or characteristics of other similarly situated contractors and how those similarly situated contractors were treated differently").

Given that this area of the law is already trending toward uniformity, there is no need for this Court to reinterpret *Twombly* or *Iqbal*'s effect on the question presented.

CONCLUSION

The petitioners have not established any compelling issues worthy of this Court's review. The respondents respectfully request their petition be denied.

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